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No. 92-1954

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE STATES OF CALIFORNIA, FLORIDA, GEORGIA, ILLINOIS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NEW YORK, OHIO, OKLAHOMA, SOUTH CAROLINA, WASHINGTON, WEST VIRGINIA AND WISCONSIN IN SUPPORT

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QUESTIONS PRESENTED

1. Whether, in determining when a statutory liability was incurred for purposes of applying the exception to abatement in 1 U.S.C. § 109, a court must follow the plain language of the statute creating the liability, and must, if the court considers the language ambiguous, resolve ambiguities in favor of abatement.

2. Whether an agency charged by statute with administering statutorily-mandated penalties may adopt a statistical method that generates penalties that systematically and significantly exceed the statutorily-mandated penalty.

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INTEREST OF *AMICI CURIAE*

The States submitting this brief include States that submitted similar briefs as of right in the district court (D.C.R. 37)[1] and court of appeals below, as well as additional States. This brief is presented on behalf of the Attorneys General of the *amici* States as a matter of right pursuant to Sup. Ct. R. 37.5.

All of the *amici* States face the possibility, in the future, of being penalized by the Food and Nutrition Service of the U.S. Department of Agriculture ("FNS") for allegedly excessive error rates in the Food Stamp Program for years following Federal Fiscal Year ("FFY") 1991. Seven of them — California, Florida, Georgia, New York, Ohio, Washington and West Virginia — recently were advised of potential claims from FNS for FFY 1992 totalling over $185 million.

The present case involves an alleged Food Stamp error-rate liability for the second half of FFY 1982. It is the last pending Food Stamp error-rate liability case for any period prior to FFY 1992. It is also the only Food Stamp error-rate penalty case ever to go to judgment in federal court on the merits.[2] As such, it is highly important to the *amici* States, both as a general precedent that may well affect future administrative, judicial and legislative actions in this area, and because of the potential effect of the specific holdings made in this case.

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[1] The administrative record and the district court record are designated "A.R." and "D.C.R.," respectively.

[2] For the first three years of the error-rate liability program (FFY 1980 through FFY 1982), in every case, with the sole exception of this one, the State either (a) was found not to be liable on the ground that it had good cause for exceeding the target, (b) had its alleged liability overturned on administrative appeal, or (c) settled its alleged liability for much less than the amount claimed after bringing litigation raising some or all of the same arguments as were advanced by Massachusetts in this case. For the next three years (FFY 1983 through FFY 1985), Congress rescinded all liabilities. Pub. L. No. 101-624, § 1751, 104 Stat. 3359, 3797 (1990). For the next six years (FFY 1986 through FFY 1991), all claims were settled for 15% of the total amount (10% in the case of one State), with those funds to be spent over five years on State program improvements rather than paid to the Federal Government.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DEPARTED FROM THIS COURT'S PRECEDENTS IN ITS TREATMENT OF THE REPEAL ISSUE

This case should have been entirely disposed of on the ground that the repeal of Section 16(g) of the Food Stamp Act of 1977, as amended, abated Massachusetts' potential liability for the April-September 1982 period. That repeal eliminated, effective October 1, 1982, the statutory authority for Food Stamp error-rate penalties for periods prior to FFY 1983. The repeal of the statutory basis for a penalty abates that penalty unless the liability is saved by some express provision of law. There was no specific saving provision in the 1982 legislation. The general federal saving statute, 1 U.S.C. § 109 (1988), did not save the liability, because that liability had not been "incurred," as explicitly required by Section 109, prior to October 1, 1982.

This Court has previously found that the need to ensure consistent interpretation of 1 U.S.C. § 109 presents an important question of federal law requiring a grant of certiorari.[3] The construction employed by the court of appeals so departs from this Court's precedents as to require review and correction.

A. The Repeal

In 1980, Congress created the error-rate liability program upon which the penalty claimed from Massachusetts is based. Section 126 of the Food Stamp Amendments Act of 1980, Pub. L. No. 96-249, 94 Stat. 357, 364, added Section 16(g) to the Food Stamp Act of 1977. Section 16(g) established

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[3] *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 387-88 (1953); *see also Warden* v. *Marrero*, 417 U.S. 653, 656 & n.7 (1974) (resolving conflict among the circuits as to proper interpretation of Section 109); *Bradley* v. *United States*, 410 U.S. 605, 607 (1973) (same).

"an error liability program under which each State agency shall, other than for good cause as determined by the Secretary, pay" a penalty based on the extent to which a State's error rate in each half of each Federal Fiscal Year exceeded a specified target. 7 U.S.C. § 2025(g) (Supp. V 1981). The penalty for a particular six-month penalty period was equal to the number of percentage points by which the State's error rate for that period exceeded its target, times the dollar value of the Food Stamp benefits given out by the State during that period.

In 1982, Congress repealed Section 16(g) and replaced it with a new provision, Section 16(d), that expressly imposed penalties *only* for FFY 1983 (October 1, 1982 to September 30, 1983) and thereafter. *See* Pub. L. No. 97-253, § 180(a)(2)-(3), 96 Stat. 763, 782-83 (1982). To underscore further that this liability was being imposed *only* for FFY 1983 and thereafter, Congress specifically provided that the effective date of these changes was October 1, 1982. *Id.* § 193(b), 96 Stat. at 789.

The new penalty provision that became effective beginning with FFY 1983 differed from the old one in a number of respects. In particular, penalty amounts were sharply reduced by changing their financial basis from a percentage of the benefit dollars given out to a percentage of the federal administrative funds provided by FNS to the State to help pay the cost of running the program. The Senate Report indicated that this change was made because the high penalties under the old system simply had not been "realistic." S. Rep. No. 504, 97th Cong., 2d Sess. 69 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 1641, 1707. The Report explained that the old penalty scheme — which imposed "full liability for the cost of erroneous payments above certain levels" — had "proven difficult to apply in practice because of the relatively large amounts involved." *Id.* at 70, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 1708.

The court of appeals drew the illogical inference that the Congressional purpose to *reduce* the penalties imposed under

old law somehow supported the notion that Congress intended to preserve the high penalties and continue to impose them, after repeal, in instances where facts had not yet transpired that were necessary to determine whether a State was liable. Pet. App. A-16. Not only does this rationale make no sense; it stands traditional statutory construction on its head. Congress could have provided that its repeal of the statutory authority for the penalties would not apply to penalties for years prior to FFY 1983, but it did not. Or, Congress could have specified as an effective date for the repealing provision a point in time *after* the facts necessary to ascertain whether a State was liable.[4] "That Congress did not do so is dispositive." *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 111 S. Ct. 1282, 1294 (1991).

B. Massachusetts' Liability Had Not Been Incurred by October 1, 1982

Though the claim here is for an allegedly excessive error rate in the April-September 1982 period, Massachusetts' liability for this penalty had *not* been incurred by October 1, 1982, the effective date of the repeal of Section 16(g). This is because lack of good cause for exceeding the target was an essential element of the liability itself. The statute stated, "each State agency *shall, other than for good cause as determined by the Secretary, pay*" a penalty. FNS' practice clearly confirms this construction of the statutory scheme. When FNS determined that Massachusetts had exceeded its target error rate, it did not assert a claim against Massachusetts. Instead, FNS informed Massachusetts that if no timely application for a good cause determination was filed, FNS "will begin the process of asserting a claim."

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[4] Congress has employed this technique elsewhere. *See United States* v. *Springfield*, 829 F.2d 860, 865 (9th Cir. 1987); *United States* v. *Marachowsky*, 213 F.2d 235, 241 (7th Cir.), *cert. denied*, 348 U.S. 826 (1954); *United States* v. *Snowden*, 677 F. Supp. 1108, 1109 (D. Kan. 1988).

D.C.R. 37, Ex. I. Only *after* FNS had completed its review of Massachusetts' good cause application did FNS inform Massachusetts that it "ha[d] *incurred* certain fiscal liabilities which are now due." D.C.R. 37, Ex. J (emphasis added).

By the explicit terms of FNS' regulations, the facts determinative of whether Massachusetts was entitled to such a good-cause determination had not arisen, *and could not have arisen*, by October 1, 1982. There are two separate reasons for this.

1. ***Good Faith.*** The FNS regulation governing good-cause determinations with respect to the period at issue here was 7 C.F.R. § 275.25(d)(5)(i) (1982). That regulation specified that FNS would "determine [whether] the State had good cause for not achieving its payment error rate goal" on the basis of several listed criteria. One of these was "[g]ood faith efforts by the State to reduce or maintain its error rate." The regulation, in defining this criterion, specified that events after the end of the penalty period at issue were an essential part of whether good faith would be found. It said that a State could "establish good cause by proving it has made exemplary efforts to reduce errors or has invested an unusual amount of resources into achieving error reduction, and that error reduction has begun to result after the conclusion of the QC measurement period." It stressed: "Substantial weight shall be given to the achievement of results stemming from the State's efforts." *Id.*

The State Food Stamp Appeals Board — the administrative tribunal that acted for the Secretary of Agriculture in reviewing claims of this kind — repeatedly applied this regulation just as it was written. For example, the Board found the State of Colorado not to be liable for a penalty with respect to the April-September 1981 period because Colorado was entitled to a good-cause determination under the good-faith criterion. *See* D.C.R. 37, Ex. C. In so finding, the Board relied on error-reduction actions by Colorado, and reductions in Colorado's error rate, occurring *after* the end of the April-September 1981 period. In fact, Colorado's error rate had been higher than in the April-

September 1981 period during both of the two subsequent six-month periods, but then had begun to fall in FFY 1983. *See* D.C.R. 37, Ex. D, p. 3. The Board held that Colorado had satisfied the good-faith criterion on the basis of (a) its implementation of a corrective action plan in March 1982 and its direct State-level takeover of Food Stamp program administration in one large county in July 1982 — both *many months* after the end of the penalty period; and (b) the ultimate resulting error-rate reductions in FFY 1983 — *two years* after the penalty period.

In many other cases as well, both FNS and the Board decided whether there was good cause under the good-faith criterion on the basis of error-reduction efforts, and actual resulting error rates, occurring long *after* the penalty period. *See* D.C.R. 37, Exs. E & F. The only difference in the approaches of FNS and the Board was that FNS argued that such determinations should be based on error-reduction activities and error-rate performance for *one* year following the penalty period, while the Board instead looked to a period of *two* years. But this difference is irrelevant here, because if one must look — as one must in this case — to events even *one day* after the termination of the penalty period, which here coincides with the effective date of the repeal legislation, in order to determine whether Massachusetts incurred any liability, that liability was abated by the repeal, and was not saved by 1 U.S.C. § 109.

2. ***Automatic Good Cause.*** In addition to listing various good-cause criteria, including the good-faith criterion just discussed, 7 C.F.R. § 275.25(d)(5)(i) also set forth, as a safe harbor, an "automatic good cause" provision. Like the good-faith criterion, a State's entitlement to "automatic good cause" turned on facts occurring *after* the penalty period. A State qualified for this safe harbor if it had implemented, prior to the penalty period, "an FNS-approved corrective action plan . . . specifically designed to reduce the State's payment error rate" (which Massachusetts had done), *and* its error rate in the six-month period one year *after* the six-month penalty period fell below a level specified in the

regulation. Here again, this integral element of any liability could not be determined, one way or the other, until a full year after the penalty period, and after the effectiveness of Congress' repeal of the statutory basis for Massachusetts' purported liability. Because of both the good-faith criterion for a good-cause determination and the "automatic good cause" safe harbor, a State *could not*, under the regulations in effect with respect to the April-September 1982 penalty period, incur liability for an error-rate penalty until a date *at least* one year after the end of the penalty period. That date, for Massachusetts, was October 1, 1983 — a full year after the October 1, 1982 effective date repeal of the statutory basis for the liability.[5]

C. The Repeal Abated Any Potential Liability

Few propositions are more firmly established in federal law than that a penalty or liability cannot be imposed if the statutory basis for it is repealed prior to its final imposition, unless an explicit statutory saving clause preserves it. *See, e.g.*, *United States* v. *Reisinger*, 128 U.S. 398, 401 (1888) ("the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution").[6]

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[5] The court of appeals mistakenly said that Massachusetts claimed no penalty could be incurred until after a requested good cause determination had been denied. Pet. App. A-11. The point is that no penalty may be incurred until after the period required, by FNS' own regulations, to ascertain the facts necessary to a good cause determination.

[6] *See also, e.g.*, *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 432 (1972); *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 312-14 (1964); *Bell* v. *Maryland*, 378 U.S. 226, 231 n.2 (1964); *United States* v. *Chambers*, 291 U.S. 217, 222-23, 226 (1934); *Gulf, Colorado & Santa Fe Ry.* v. *Dennis*, 224 U.S. 503, 506 (1912); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88 (1871); *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, (continued...)

There was no saving clause in the 1982 statute that repealed Section 16(g), and not the slightest hint in the statute or its legislative history that Congress intended to preserve pre-FFY 1983 liabilities. To the extent there is any indication of Congress' intent, it is to be found in the Senate Report statements suggesting that Congress intended to eliminate the "large" pre-1983 penalties, which had "proven difficult to apply" and had simply not been "realistic." (As we have noted, all of them except this one were resolved favorably to the States. *See supra* note 2.)

The only saving provision that might apply — and the one relied upon by the court of appeals — is the general federal saving statute, 1 U.S.C. § 109. That statute states, as pertinent here: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability *incurred* under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." (Emphasis added.) To the extent of its coverage, and *only* to that extent, this statute reverses the common law rule of abatement. As such — as a liability-*imposing* exception to the common law — it "must be strictly construed." *United States* v. *Auerbach*, 68 F. Supp. 776, 778 (S.D. Cal. 1946).[7]

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[6](...continued)
514 (1869); *Norris* v. *Crocker*, 54 U.S. (13 How.) 429, 440 (1852); *Maryland* v. *Baltimore & Ohio R.R.*, 44 U.S. (3 How.) 534, 552 (1845); *Yeaton* v. *United States*, 9 U.S. (5 Cranch) 281, 283 (1809) (Marshall, C.J.); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1802) (Marshall, C.J.).

[7] *See also, e.g., United States* v. *Hark*, 49 F. Supp. 95, 97 (D. Mass. 1943), *rev'd on other grounds*, 320 U.S. 531 (1944); Million, *Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder*, 24 OR. L. REV. 25, 40 n.55, 51 (1944). *Cf. United States* v. *Mann*, 26 Fed. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718) (Story, Circuit Justice) (narrowly construing special savings clause); *Anonymous*, 1 Fed. Cas. 1032, 1035 (C.C.D. Pa. 1804) (No. 475) (Washington, Circuit Justice) (same); E. (continued...)

As the court of appeals failed to recognize, Section 109 expressly applies only to liability "*incurred*" before a repeal. In order for it to apply, *all* the factual predicates to liability must have occurred before the repeal. This Court has explained that a liability is "incurred" for purposes of preservation under Section 109 when "the occurrence of no other fact or event was essential to the imposition of liability" and "the ultimate obligation to pay" is "certain and fixed." *Hertz* v. *Woodman*, 218 U.S. 205, 220, 221 (1910). If the obligation was not certain and fixed prior to the repeal, there would be no liability for Section 109 to save. *Id.* at 224.

In the scores of cases that *have* applied Section 109 (and its predecessors) to save liabilities, this definition of "incurred" has been consistently applied. *See, e.g.*, *Warden* v. *Marrero*, 417 U.S. 653 (1974); *Bradley* v. *United States*, 410 U.S. 605 (1973); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386 (1953); *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *Great Northern Ry.* v. *United States*, 208 U.S. 452 (1908); *United States* v. *Reisinger*, 128 U.S. 398 (1888).[8]

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[7](...continued)
CRAWFORD, THE CONSTRUCTION OF STATUTES § 300 (1940) (savings clause should be strictly construed as applied to penal statutes); G. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 484, at 689 n.70 (1888) (same).

[8] In addition, Exhibit F to the Brief *Amici Curiae* filed with the court of appeals listed numerous reported federal court of appeals and district court decisions applying Section 109 to save a liability. Like the Supreme Court cases cited above, these cases consistently involved situations in which all facts necessary to create liability had occurred prior to repeal of the statutory basis for the liability. The only reported cases applying Section 109 to save a liability that are even arguably ambiguous in this regard are *Katz* v. *Litman*, 89 F. Supp. 706 (E.D. Pa. 1949), *Pruitt* v. *Litman*, 89 F. Supp. 705 (E.D. Pa. 1949), and *Rheinberger* v. *Reiling*, 89 F. Supp. 598 (D. Minn.), *aff'd*, 185 F.2d 406 (8th Cir. 1950). The facts and reasoning of those cases are unclear. *See United States* v. *Fortier*, 89 F. Supp. 708, 710 (D.N.H.), *aff'd*, 185 F.2d 608 (1st Cir. 1950). However, to the extent that they may "tend against" the conclusion that all
(continued...)

That *all* factual predicates to liability must occur prior to repeal in order for 1 U.S.C. § 109 to save a liability is made doubly clear by the cases that have *refused* to apply Section 109 to save liabilities because some liability-creating fact had not yet occurred at the time of the repeal. *See, e.g., Master Sheet Metal Workers Ass'n* v. *Local Union No. 17*, 397 F. Supp. 1372, 1380 n.12 (D.R.I. 1975) (violation of wage control order after repeal of statutory basis for order); *United States* v. *Fortier*, 89 F. Supp. 708, 709-10 (D.N.H.), *aff'd*, 185 F.2d 608, 611 (1st Cir. 1950) (sale of house in excess of ceiling price after repeal of statutory basis for price controls); *United States* v. *C.B.S. Construction Co.*, 93 F. Supp. 664, 666 (S.D. Fla. 1950) (same); *Woods* v. *Jacey Management Corp*, 78 F. Supp. 503, 505-06 (S.D.N.Y. 1948) (violation of rent control orders after repeal of statutory basis for rent controls); *United States* v. *Auerbach*, 68 F. Supp. 776, 782 (S.D. Cal. 1946) (conspiracy covering period that did not end until after repeal of criminal statute); 17 Op. Att'y Gen. 539, 542 (1883) (liability for tax on average deposits and capital stock for half-year period that did not end until after repeal of tax law).[9]

These decisions are identically applicable here. Massachusetts' liability was not saved by Section 109 because the facts determinative of whether Massachusetts was entitled to a good-cause determination *could not* have been in place until October 1, 1983 at the earliest. Nor is it a valid response to contend that lack of good cause was not an element of the

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[8](...continued)
liability-creating facts must occur prior to repeal, these three cases were specifically disapproved in *United States* v. *Fortier*, 185 F.2d at 611-12. *See also United States* v. *C.B.S. Construction Co.*, 93 F. Supp. 664, 666 (S.D. Fla. 1950).

[9] *See also Mason* v. *Sargent*, 104 U.S. 689 (1882) (inheritance tax had not accrued prior to repeal of tax statute so as to be saved by saving clause in repealing statute); *Clapp* v. *Mason*, 94 U.S. 589 (1877) (same); *Eidman* v. *Tilghman*, 136 F. 141 (2d Cir. 1905), *aff'd*, 203 U.S. 580 (1906) (same); *United States* v. *Kelley's Administrators*, 28 F. 845 (C.C.E.D. Pa. 1886) (same); *United States* v. *Rankin*, 8 F. 872 (C.C.E.D. Mo. 1881) (same).

liability. As noted, the statute plainly defined the *liability itself* as *not being incurred* if a State had good cause for exceeding its error-rate target ("each State agency *shall, other than for good cause as determined by the Secretary, pay*" a penalty).[10] FNS simply could not have stated a cause of action against Massachusetts prior to October 1, 1983.

The court of appeals stated "two main reasons" for its conclusion that Section 109 saved the statutory basis for the penalty. Pet. App. A-12. First, the court of appeals reasoned that Section 109 "was designed to prevent exactly the sort of lapse" at issue here. Pet. App. A-12 to -13. Second, the court of appeals paraphrased 7 U.S.C. § 2025(g)(1) as providing that liability is incurred *before* the good cause determination. Neither of these reasons withstands analysis.

The court of appeals, apparently thinking that the 1982 legislation increased rather than decreased Food Stamp error-rate penalties, said that Section 109 was designed to address "a substitution of a new statute with a greater schedule of penalties" for a provision, otherwise similar, that contained lesser penalties. Pet. App. A-13 (quoting *Hamm* v. *City of*

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[10] The fact that lack of good cause was a factual predicate to liability cannot be evaded by assigning it some other label. For example, calling good cause an "exception" or a "defense" to liability cannot change the reality that, *by the express terms of the statute*, a State was *not liable in the first place* if it had good cause for exceeding its target. Any factual element of any liability might just as well be called an "exception" or "defense." One might assert, for example, that *all* States are liable for error-rate penalties, *unless* a determination is made that they met their error-rate targets; but this would not change the fact that a State would not incur liability at all until the penalty period was over and it *had* exceeded its target. Similarly, to say that a good-cause determination was some sort of "special dispensation" available only *after* a State became liable would be to contradict the facts. A good-cause determination was not an arbitrary act of grace in the nature of executive clemency; rather, it was, by statute, an essential step in whether a State *became* liable, and the grounds for it were fixed objectively by regulation. FNS' conduct confirmed this. *See supra* pp. 4-5. Moreover, even if there were any room to debate these notions -- and the *amici* States do not believe there is -- the rule of strict construction of Section 109 would require resolving any doubts in favor of Massachusetts.

Rock Hill, 379 U.S. 306, 314 (1964)). But here, the new statute applied *only* to FFY 1983 and thereafter. Moreover, the new provision in fact *reduced* penalties, because they had been unduly harsh. But in any case, this Court has never held that the test for applicability of Section 109 is whether the repealed act is replaced with greater or lesser penalties. Indeed, it has expressly rejected that interpretation of Section 109. Thus, in *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974), the Court observed that Section 109 was designed to limit the common law rule of abatement, noting that such "abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties."[11] Rather, the test is one derived from the language of Section 109 itself: whether the liability had been "incurred" prior to repeal.[12]

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[11] *See also Bradley* v. *United States*, 410 U.S. 605, 607-08 (1973) ("Abatement by repeal included a statute's repeal and re-enactment with different penalties. And the rule applied even when the penalty was reduced.") (citations omitted); *United States* v. *Havener*, 905 F.2d 3, 5 (1st Cir. 1990) (Section 109 "provides that new statutes that *decrease* punishment normally do not affect pending prosecutions.").

[12] Even if the court of appeals was understood to be making the point that Section 109 was designed to distinguish between "technical abatements" and "nontechnical abatements," it would still have applied the wrong test. A "technical abatement" resulted when a "statute was repealed and reenacted with different penalties" regardless of whether the reenacted provision increased or decreased penalties. *United States* v. *Breier*, 813 F.2d 212, 215 n.2 (9th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988). In contrast, a "nontechnical abatement of prosecution occurred at common law when a statute was changed so that the conduct in question was no longer a crime." *Id.* This Court has applied Section 109 regardless of whether the abatement would be "technical" or "nontechnical," *id.* (citing *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 553-55 (1954); *Hertz* v. *Woodman*, 218 U.S. 205, 214-18 (1910); *United States* v. *Reisinger*, 128 U.S. 398, 401-02 (1888)), and has instructed "that focus on whether a prosecution would 'technically abate' under the common law rule is not the proper analysis" to determine the applicability of Section 109, *Breier*, 813 F.2d at 215 n.2. Rather, this Court has repeatedly held that the test is whether the liability was "incurred" prior to repeal. *E.g.*, *Marrero*, 417 U.S. at 660; *Hertz*, 218 U.S. at 220, 221.

The court of appeals' second reason was based on its paraphrasing of Section 16(g) as "providing that, under the Food Stamp Act's liability program, an offending state shall pay the imposed fine unless the Secretary determines that good cause exists for waiver." Pet. App. A-14. On this basis, the court declared: "We do not think Congress placed the cart to the horse's rear by accident." *Id.* But in paraphrasing the relevant statutory provision, *the court of appeals reversed the order of the operative words.* The statute *does* place the good cause determination before the requirement that a state pay any fine: "each State agency *shall, other than for good cause as determined by the Secretary, pay*" a penalty. 7 U.S.C. § 2025(g)(1) (Supp. V 1981) (emphasis added). The court of appeals was correct that the ordering of the operative statutory terms was not an accident; but it misstated the actual terms of the statute.

II. THE COURT OF APPEALS DEPARTED FROM THIS COURT'S PRECEDENTS IN HOLDING THAT AN AGENCY MAY ADOPT A STATISTICAL METHOD THAT GENERATES PENALTIES SIGNIFICANTLY IN EXCESS OF STATUTORILY-MANDATED AMOUNTS

A. FNS' Method Incorporates A Systematic and Significant Upward Bias in Penalties

Section 16(g), as in effect prior to its repeal, required a State's penalty to equal the number of percentage points by which its error rate exceeded its target for the penalty period, times the benefit dollars expended in the period. The statute defined the amount as:

> "the amount by which the dollar value equivalent of the State agency's *payment error rate*, as determined by the Secretary for each six-month period, exceeds the dollar value equivalent of either —
>
> (A) the State agency *payment error rate* for

> the base period less a national annual rate of error reduction, as determined by the Secretary, taking into account program circumstances and rates of error reduction in comparable Federal or federally assisted public assistance programs, or
>
> (B) the national standard *payment error rate* for the base period, whichever is higher."

7 U.S.C. § 2025(g)(1) (Supp. V 1981) (emphasis added). The emphasized term, "payment error rate," was in turn expressly defined as "the *percentage of all food stamp allotments* which are issued in a given period by a State agency to households that fail to meet the eligibility requirements of sections 2014 and 2015 of this title, are overissued to eligible households, and are underissued to eligible households." *Id.* § 2025(g)(2)(B) (emphasis added). Thus, the statute defined the penalty in terms of a specific quantity — the *true* error rate. Instead of directly measuring the true error rate, however, FNS chose to estimate it through sampling. That, in itself, was perfectly appropriate, but the way that FNS then used the sampling results systematically generated penalties significantly in excess of the amount called for by the statute.

Massachusetts' expert, Dr. Fairley, showed that the source of the unlawful upward bias in penalties was twofold. First, given the *asymmetry* of the penalty system established by Congress — *i.e.*, the fact that States exceeding their targets pay penalties while States below their targets do not receive offsetting penalty refunds — the use of sampling-based error rates, with each error rate set at the midpoint of the statistical confidence interval, yielded, *in the context of FNS' overall statistical methodology*, a sharp upward bias in resulting penalties. *For example, a State exactly at the target would be penalized about half the time, even though it should owe nothing.* Second, the sampling phenomenon known as "extreme-value bias" added still further inflation to penalties of statistical "outlier" States; it meant that high error-rate estimates, such as Massachusetts' for this period, were

extremely likely to be excessive.

FNS could readily have corrected for these one-way biases, while still using sampling. Nothing in the statute or FNS' regulations required that the method FNS used be employed; FNS simply adopted it by administrative fiat, and never exposed it to notice-and-comment rulemaking.

Neither FNS nor the district court disputed the basic *facts* presented by Dr. Fairley. Indeed, FNS *conceded* the upward bias in penalty amounts. The upward bias that Dr. Fairley identified was confirmed by Congressionally-mandated studies by the National Academy of Sciences and FNS itself,[13] and has since also been confirmed by the U.S. Department of Health and Human Services Departmental Appeals Board, which adopted Dr. Fairley's analysis in overturning a series of similar error-rate penalties in the Medicaid program.[14]

The court of appeals acknowledged that FNS' statistical methods produced a bias. Pet. App. A-23 to -24. The court concluded, however, that this bias was permissible because administrative agencies are entrusted with broad discretion so that whether "the administrative scheme might *occasionally* operate unfairly from a particular participant's perspective is [not] sufficient, standing alone, to undermine the scheme's legality." Pet. App. A-26 (emphasis added). This bias, however, operated *systematically*, not occasionally.

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[13] *See* FNS, *The Food Stamp Program Quality Control System: A Report to the U.S. Congress*, May 1987 (D.C.R. 37, Ex. N), p. 180 ("Because States receive no 'credit' for error rates below the threshold, average liabilities are overstated relative to the liability that would be determined if the true error rate were known."); Westat, Inc., for FNS, *A Statistical Evaluation of Food Stamp Quality Control*, Sept. 1987 (D.C.R. 37, Ex. O), p. 3-4; National Academy of Sciences, *Rethinking Quality Control: A New System for the Food Stamp Program*, May 1987 (D.C.R. 37, Ex. P), pp. 147-48, 162-63, 169-74.

[14] *See In re FY 1981 Medicaid Quality Control Disallowances*, Docket Nos. 90-86, 90-87, 90-88 & 90-89, Decision No. 1332 (DHHS Departmental Appeals Bd. 1992) (filed with the court of appeals as Exhibit T to the Brief *Amici Curiae*).

B. FNS Had Non-Biased Alternatives That Would Have Been Just As Easy To Administer

The only justification the court of appeals cited for permitting FNS to calculate penalties that systematically and significantly exceeded the penalty Congress had specified was that "[t]he proposed alternatives would by all accounts be more complicated to administer and could well prove less of a deterrent." Pet. App. A-29. But in fact, at least one of the proposed statistical alternatives — using a lower end of an appropriate statistical confidence interval instead of the mid-point of the confidence interval — would have been just as easy to administer. This method would have entailed use of the very same sampling system employed by FNS. The only difference would be that instead of selecting the mid-point of the confidence interval and thereby systematically favoring itself with higher penalties, FNS would select an appropriate statistical lower bound of the confidence interval, thereby eliminating the systematic bias toward excessive penalties. Fairley Aff. (D.C.R. 35), p. 7.

C. By Justifying FNS' Scheme On The Basis That It Generated Higher Penalties, The Court Of Appeals Rewrote the Statute

Other than the added burden supposedly associated with alternatives, the only remaining justification the court of appeals identified to support FNS' use of methods with an upward penalty bias was that this provided a more efficient deterrent — *that is, generated higher penalties*. Pet. App. A-29. First, this explanation is nothing more than circular reasoning: a method for calculating higher penalties is justified because it generates higher penalties. Second, this explanation effectively authorizes FNS to ignore the Congressional determination of the proper level of penalties. The court of appeals' conclusion that the broad purpose of the provision was to "deter" the states from making errors

engages in the very type of non-textual analysis that this Court has repeatedly condemned.

> "'The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' Congress, in the exercise of its legislative powers, is free to say 'this much and no more.'"

Miles v. *Apex Marine Corp.*, 498 U.S. 19, 24 (1990) (citation omitted). The court of appeals was not free to uphold a system that imposed penalties significantly in excess of those expressly prescribed by statute based on its view that penalties larger than those specified by Congress would better serve the broad purpose of the statute.

D. Administrative Efficiency Cannot Justify The Use Of A Statistical Method That Generates Penalties Larger Than Congress Specified

This Court has previously addressed the type of systematic and significant bias at issue in this case and has held that administrative efficiency could not sustain such biased methods. In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), Congress had required that State computation of the level of benefits for recipients of the Aid to Families with Dependent Children ("AFDC") program be premised on a standard of need that reflected the cost of living, and that States imposing a maximum on the benefits any individual or family could receive re-evaluate the maximum. *Id.* at 413-14. New York had previously computed its standard of need on an individualized basis. *Id.* at 416. It then switched to a system of fixed maximum allowances that eliminated many costs that had previously been considered in making individualized determinations of the level of need. *Id.* New York purportedly only "consolidate[d] items on the basis of statistical averages," *id.* at 419, but the net effect was to drastically reduce the total benefits to New York residents, *id.*

at 417. That is, the change from individualized determinations to a set of maximums applied on a statistical basis did not produce some winners and some losers with no net decrease in benefits; instead, the change systematically and significantly reduced the benefits to New York residents. New York attempted to justify its new system as more administratively efficient. *Id.* at 417. The Court rejected this argument:

> "While [the new federal legislation] does not prevent the States from pursuing what is beyond dispute the laudable goal of administrative efficiency, we think Congress has foreclosed them from achieving this purpose at the expense of significantly reducing the content of their standard of need."

Id. The Court carefully limited its decision so as to make clear that New York could employ statistical methods to achieve administrative efficiency so long as it complied with the statutory requirements: "Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may . . . redefine its method for determining need." *Id.* at 419.

In *Shea* v. *Vialpando*, 416 U.S. 251 (1974), this Court again addressed a similar issue arising from Colorado's administration of AFDC. Again the agency defended its method on the basis of administrative efficiency. *Id.* at 262 n.11, 265. The Court reaffirmed *Rosado* and rejected the agency's argument that administrative efficiency could justify the use of a method that violated the statutory mandate. "In the face of that statutory command and the clear statement of congressional purpose, we must also reject petitioners' claims of administrative efficiency or convenience." *Id.* at 266 n.13.

FNS here, like New York in *Rosado* and Colorado in *Shea*, sought to justify on the basis of administrative efficiency a method of implementing a Congressional mandate that violates the terms of that mandate. "Administrative efficiency" is insufficient to empower FNS to adopt a method

of calculating penalties that systematically generates penalties significantly in excess of those Congress directed.

E. FNS Has Mischaracterized The Bias As One That Balances Out

Rather than confront the real nature of the penalty bias, FNS has attempted to portray the issue as one similar to that addressed by this Court in *Knebel* v. *Hein*, 429 U.S. 288 (1977). FNS argued in its brief before the court of appeals ("FNS Br.") that "even were there any unfairness *in particular instances*, the Supreme Court has upheld food stamp regulations so long as they are within the broad zone of statutory authority." FNS Br. at 24 (citing *Knebel*, 429 U.S. at 294; emphasis added). In *Knebel*, however, the Court addressed only the situation where "the regulations operate somewhat unfairly in appellee's case." 429 U.S. at 294. The Court did not address the situation where, as here, the regulations impose broad systemic unfairness. Moreover, the *Knebel* court found that "a plainly acceptable reason exists for rejecting each of the[] possible alternatives." *Id.* at 294-95. Here the *only* rationale provided for rejecting one of the proposed alternatives — use of an appropriate lower bound of the confidence interval — is to produce penalties in excess of those specified by Congress.

FNS' suggestion that the penalties in excess of the statute are somehow offset does not withstand analysis. FNS has argued that a separately-established incentive program that provides additional funds to States with extremely low error rates justifies its use of larger penalties. FNS' rationale seems to be that because Congress established one program to reward States, FNS is free to operate another program in a fashion that penalizes States in amounts greater than specified by Congress. This is not the law. It makes no sense to suggest that what Congress had in mind in enacting

the enhanced funding program in *1977*[15] was to correct for an overstatement of penalties that would occur in the error-rate penalty program — not enacted until *1980*[16] — when FNS improperly introduced statistical bias into the latter program. Rather, Congress intended for each of these two programs to stand on its own. The serious upward bias in error-rate penalties cannot be disregarded simply because there is a separate enhanced funding program.[17]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[15] *See* Pub. L. No. 95-113, § 1301, 91 Stat. 913, 976 (1977) (enacting Section 16(c) of the Food Stamp Act of 1977, codified as 7 U.S.C. § 2025(c)).

[16] *See* Pub. L. No. 96-249, § 126, 94 Stat. 357, 364 (1980) (enacting Section 16(g) of the Food Stamp Act of 1977, as amended, codified as 7 U.S.C. § 2025(g)).

[17] Moreover, FNS correctly characterizes the incentive program as one available only to States demonstrating "stellar performance." FNS Br. at 12, 27 n.9, 33. This provision does not come into play sufficiently to offset the penalty bias.